

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE,

Plaintiff,

v.

KATHLEEN ALLISON, et al.,

Defendants.

No. 2:20-cv-02482 WBS AC

ORDER RE: MOTION FOR PARTIAL
SUMMARY JUDGMENT¹

COUNTY OF AMADOR, a public
agency of the State of
California,

Plaintiff,

v.

KATHLEEN ALLISON, et al.,

Defendants.

-----oo0oo-----

¹ Plaintiffs' motion is titled a "Motion for Summary Adjudication." (Docket No. 45.) Because Federal Rule of Civil Procedure 56, upon which the motion is based, refers only to "summary judgment," the court will use that term in this Order.

1 Plaintiffs California Sportfishing Protection Alliance
2 ("CSPA") and County of Amador ("Amador") brought this now-
3 consolidated action against Kathleen Allison, in her official
4 capacity as Secretary of the California Department of Corrections
5 and Rehabilitation ("CDCR"), and Patrick Covello, in his official
6 capacity as Warden of CDCR's Mule Creek State Prison
7 (collectively "defendants"), seeking declaratory and injunctive
8 relief for alleged violations of the Clean Water Act, as amended
9 by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et
10 seq. (See First Amended Complaint ("FAC") (Docket No. 35); Order
11 Consolidating Cases (Docket No. 18).) Plaintiffs now move for
12 partial summary judgment. (Docket No. 45.)

13 I. Factual and Procedural Background

14 The CDCR, California's state prison system, owns and
15 operates Mule Creek State Prison outside of Ione, California,
16 housing roughly 4,000 prisoners. (See Revised Stormwater
17 Collection Sys. Investigation Rep. of Findings § 1.3 (June 2020)
18 ("Revised Investigation Rep.") (Docket No. 49-7 at 18).) In
19 addition to housing prisoners, the prison provides space and
20 utilizes prisoner labor for meat packing, coffee roasting and
21 packing, and textile manufacturing operations. (Id. § 1.2.) The
22 prison also owns and operates a stormwater collection system,
23 known as an MS4, which is composed of a variety of conveyances
24 (such as drains, ditches, swales, and outfalls) that operate to
25 channel storm water away from the facility, toward Mule Creek.
26 (See id. § 1.3.) Mule Creek is a tributary to Dry Creek, which
27 in turn is a tributary to the Mokelumne River. (Cent. Valley
28 Reg'l Water Quality Ctrl. Bd., Water Code 13383 Order to Monitor

1 Discharges to Surface Water (Dec. 22, 2020) ("Dec. 13383 Order")
2 (Docket No. 45-10 at 76).)

3 The Clean Water Act "prohibits the 'discharge of any
4 pollutant' from any 'point source' into 'navigable waters' unless
5 the discharge complies with certain other sections of the [Act]."
6 Nat. Res. Def. Council, Inc. v. County of Los Angeles, 725 F.3d
7 1194, 1198 (9th Cir. 2013) (quoting 33 U.S.C. § 1311(a)).

8 Discharges are considered compliant with the Act if they are
9 allowed by a permit issued to the discharging entity under the
10 Act's National Pollutant Discharge Elimination System ("NPDES")
11 program. See Arkansas v. Oklahoma, 503 U.S. 91, 101-02 (1992).
12 In California, NPDES permits may be issued by state- and
13 regional-level water boards charged with establishing water
14 quality standards, which determine the maximum permissible levels
15 of various contaminants in surface waters based on the beneficial
16 uses for which a given body of water has been designated. See
17 Nat. Res. Def. Council, 725 F.3d at 1198-99; 33 U.S.C.
18 §§ 1313(c)(2)(A), 1342; Cal. Water Code §§ 13140, 13240.

19 The Clean Water Act includes a citizen suit provision,
20 allowing citizens to bring a civil action "against any person
21 . . . who is alleged to be in violation of [] an effluent
22 standard or limitation under [the Act]." 33 U.S.C. § 1365(a)(1).
23 "[A]n 'effluent standard or limitation'" is in turn defined "as
24 including 'a permit or a condition of a permit issued under
25 section 1342'" of the Act. Inland Empire Waterkeeper v. Corona
26 Clay Co., 17 F.4th 825, 835 (9th Cir. 2021) (citing 33 U.S.C.
27 § 1365(f)(7)) (emphasis omitted). The Clean Water Act therefore
28 allows citizen suits to enforce conditions of NPDES permits.

1 N.W. Env't Advocs. v. City of Portland, 56 F.3d 979, 986 (9th
2 Cir. 1995) (citations omitted).

3 Two NPDES permits are relevant to plaintiffs' claims.
4 The first, the Small MS4 Permit, authorizes discharges of
5 stormwater from the prison's MS4 conveyance system, subject to
6 contaminant limitations based on applicable water quality
7 standards. (See State Water Res. Ctrl. Bd. Water Quality Order
8 No. 2013-001-DWQ, NPDES Gen. Permit No. CAS000004 ("Small MS4
9 Permit") §§ B-D (Docket No. 45-11 at 211-13).) It prohibits
10 discharge of material other than stormwater from the MS4 unless
11 specifically authorized by the Small MS4 Permit. (See id. § B.)
12 Under the Small MS4 Permit, the permittee is also charged with
13 monitoring discharges from the covered facility to determine
14 compliance with the permit's requirements. (See id. § E; cf.
15 Dec. 13383 Order § II.)

16 The second permit, the Industrial General Permit,
17 regulates discharges of stormwater and other authorized
18 discharges from industrial facilities, such as those used for
19 meatpacking, coffee roasting, and textile production operations
20 at the prison. (See NPDES Gen. Permit for Storm Water Discharges
21 Associated with Indus. Activities, Order No. CAS000001 ("Indus.
22 Gen. Permit") § XVII (Docket Nos. 45-18, 45-19).) Although the
23 Industrial General Permit generally requires permittees to
24 prepare and implement a plan to prevent pollution of stormwater
25 from their industrial operations, an exclusion from these
26 requirements is available to permittees with storm-resistant
27 shelters that protect their industrial activities (and materials
28 used therein) from exposure to runoff and precipitation. (See

1 id. § XVII (Docket No. 45-19 at 6).) If the exception applies to
2 a permittee, the permittee is eligible to receive a No Exposure
3 Certification. (See id.)

4 Plaintiff CSPA filed this action on December 15, 2020,
5 and plaintiff Amador filed its original action on January 7,
6 2021. (Docket Nos. 1, 19.) After the cases were consolidated,
7 the plaintiffs jointly filed what is now the operative complaint
8 on January 26, 2022. (Docket No. 35.) Plaintiffs filed the
9 instant motion for partial summary judgment on June 28, 2022.
10 (Pls.' Mot. for Summ. J. ("Mot.") (Docket No. 45).)

11 II. Defendants' Objections

12 In response to plaintiffs' motion, defendants have
13 filed a 71 page list of single-spaced objections. (See Defs.'
14 Objs. (Docket No. 48-4).) Although the court has not counted the
15 individual objections, it is clear that they number in the
16 hundreds. One can only imagine how many attorney hours were
17 spent coming up with what appears to be every conceivable
18 objection and putting each into writing, and how much time
19 plaintiffs' counsel was in turn required to spend responding to
20 those objections. This all-too-common practice operates as a
21 substantial drain on the resources of the court and, likely, the
22 clients who are billed for these countless hours of work.
23 Counsel would do well to consider whether a particular objection
24 is in fact meaningful and important to their clients' case before
25 including it in a laundry list that the court must sift through
26 before reaching a motion's merits.

27 Defendants' objections all appear to fall into a few
28 categories: those based on (1) a lack of foundation or personal

1 knowledge, or on speculation; (2) improper opinion testimony;
 2 (3) hearsay; (4) the best evidence rule; and (5) vagueness and
 3 ambiguity. (See generally Defs.' Objs.) This court has
 4 previously explained the inapplicability of many of these forms
 5 of objections at summary judgment:

6 Objections to evidence on the ground that the evidence
 7 is . . . speculative, . . . vague and ambiguous, or
 8 constitutes an improper legal conclusion are all
 9 duplicative of the summary judgment standard itself.
 10 See Burch, 433 F. Supp. 2d at 1119-20. A court can
 11 award summary judgment only when there is no genuine
 12 dispute of material fact. Statements based on
 improper legal conclusions or without personal
 knowledge are not facts and can only be considered as
 arguments, not as facts, on a motion for summary
 judgment. Instead of challenging the admissibility of
 this evidence, lawyers should challenge its
 sufficiency. . . .

13 Alvarez v. T-Mobile USA, Inc., 2:10-cv-2373 WBS GGH, 2011 WL
 14 6702424, at *3 (E.D. Cal. Dec. 21, 2011). "Objections on these
 15 grounds are superfluous," id., and the court will overrule them.

16 Similarly:

17 [A]t the summary judgment stage the court does not
 18 "focus on the admissibility of the evidence's form,"
 19 but rather "focuses on the admissibility of its
 20 contents." Fraser v. Goodale, 342 F.3d 1032, 1036
 21 (9th Cir. 2003). Objections on the basis of a failure
 22 to comply with the technicalities of authentication
 23 requirements or the best evidence rule are, therefore,
 24 inappropriate. See Adams v. Kraft, --- F.Supp.2d ---
 25 , ---, 2011 WL 5079528, at *25 n. 5 (N.D. Cal. Oct.
 26 25, 2011) ("On summary judgment, unauthenticated
 27 documents may be considered where it is apparent that
 28 they are capable of being reduced to admissible
 evidence at trial."); Hughes v. United States, 953
 F.2d 531, 543 (9th Cir. 1992) (holding that even if
 declaration violated best evidence rule, court was not
 precluded from considering declaration in awarding
 summary judgment).

Id. at *4 (alteration adopted).

The same is true for hearsay. See Sandoval v. County

1 of San Diego, 985 F.3d 657, 666 (9th Cir. 2021). "If the
2 contents of a document can be presented in a form that would be
3 admissible at trial -- for example, through live testimony by the
4 author of the document -- the mere fact that the document itself
5 might be excludable hearsay provides no basis for refusing to
6 consider it on summary judgment." Id. (citing Fraser, 342 F.3d
7 at 1036-37). Here, as defendants have not shown, and the court
8 does not see, why the contents of the documents at issue could
9 not be properly presented at trial, the court overrules
10 defendants' objections on these grounds.

11 III. Discussion

12 Summary judgment is proper "if the movant shows that
13 there is no genuine dispute as to any material fact and the
14 movant is entitled to judgment as a matter of law." Fed. R. Civ.
15 P. 56(a). A party may move for summary judgment either for one
16 or more claims or defenses, or for portions thereof. Id. Where
17 a court grants summary judgment only as to a portion of a claim
18 or defense, it "may enter an order stating any material fact
19 . . . that is not genuinely in dispute and treating the fact as
20 established in the case." Id. at 56(g).

21 A material fact is one "that might affect the outcome
22 of the suit under the governing law," and a genuine issue is one
23 that could permit a reasonable trier of fact to enter a verdict
24 in the non-moving party's favor. Anderson v. Liberty Lobby,
25 Inc., 477 U.S. 242, 248 (1986). The moving party bears the
26 initial burden of establishing the absence of a genuine issue of
27 material fact and may satisfy this burden by presenting evidence
28 that negates an essential element of the non-moving party's

1 case. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23
2 (1986). Alternatively, the movant may demonstrate that the non-
3 moving party cannot provide evidence to support an essential
4 element upon which it will bear the burden of proof at
5 trial. Id. The burden then shifts to the non-moving party to
6 set forth specific facts to show that there is a genuine issue
7 for trial. See id. at 324. Any inferences drawn from the
8 underlying facts must, however, be viewed in the light most
9 favorable to the non-moving party. See Matsushita Elec. Indus.
10 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

11 In their motion, plaintiffs seek summary judgment on
12 each of the following issues: (1) whether Mule Creek is a "Water
13 of the United States" within the meaning of the Clean Water Act;
14 (2) whether plaintiffs have Article III standing to bring this
15 action for injunctive relief; (3) whether defendants violated
16 each of four separate provisions of the Small MS4 Permit:
17 sections (a) B.1, (b) B.2, (c) B.3, and (d) D; and (4) whether
18 defendants violated the Industrial General Permit. (Mot.) The
19 court will address each issue in turn.

20 A. Water of the United States

21 The Clean Water Act's stated objective is to "restore
22 and maintain the chemical, physical, and biological integrity of
23 the Nation's waters." 33 U.S.C. § 1251(a). It outlaws the
24 unauthorized "discharge of any pollutant by any person" into
25 "navigable waters," which the statute defines to mean "waters of
26 the United States." 33 U.S.C. §§ 1311(a), 1362(7), 1362(12).
27 Applicable regulations define "waters of the United States" to
28 include "[t]ributaries." 33 C.F.R. § 328.3(a)(2); see United

1 States v. Moses, 496 F.3d 984, 988 n.8 (“[A] tributary of waters
2 of the United States is itself a water of the United States.”)
3 (citations omitted).

4 Plaintiffs have provided evidence that Mule Creek is a
5 tributary that leads to the Mokelumne River, a navigable water,
6 that the state and regional water boards consider Mule Creek to
7 be a water of the United States, and that defendants have
8 themselves previously acknowledged that Mule Creek is a water of
9 the United States. (See Pls.’ Statement of Undisp. Facts at
10 ¶¶ 11-13 (Docket No. 45-1); Dec. 13383 Order.) Defendants do not
11 dispute this, (Defs.’ Resp. to Pls.’ Statement at ¶¶ 11-13
12 (Docket No. 51)), nor do they argue that Mule Creek is not a
13 water of the United States, (see Defs.’ Opp. to Mot. for Summ. J.
14 (“Opp.”) (Docket No. 48)).

15 The court concludes Mule Creek is a water of the United
16 States and will enter partial summary judgment accordingly. See
17 Fed. R. Civ. P. 56(a), (g).

18 B. Standing

19 Plaintiffs also seek summary judgment on the issue of
20 whether they have standing to bring this action. “In order to
21 satisfy Article III’s standing requirements in a C[lean] W[ater]
22 A[ct] citizen enforcement action, ‘a plaintiff must show (1) it
23 has suffered an injury in fact that is (a) concrete and
24 particularized and (b) actual or imminent, not conjectural or
25 hypothetical; (2) the injury is fairly traceable to the
26 challenged action of the defendant; and (3) it is likely that the
27 injury will be redressed by a favorable decision.’” Nat. Res.
28 Def. Council v. S.W. Marine, Inc., 236 F.3d 985, 994 (9th Cir.

2000) (quoting Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc., 528 U.S. 167, 180-81 (2000)) (alteration adopted).

1. Amador County

Plaintiff Amador argues it has standing on multiple grounds, including on the ground that it has expended funds and other resources to monitor the impacts of stormwater discharges from the prison. "[E]conomic injuries have long been recognized as sufficient to lay the basis for standing" Sierra Club v. Morton, 405 U.S. 727, 733 (1972). In support, plaintiffs point to a memorandum the county's Community Development Director prepared for its Board of Supervisors in January of 2020, titled "Mule Creek State Prison - Update on Releases." (See Pls.' Ex. 4 (Docket No. 45-10 at 66).)

The memorandum notes that stormwater releases at the prison have concerned the regional water board and local residents, and it advises the Board of Supervisors that the CDCR submitted a report regarding sources of contamination in stormwater. (Id.) It thus demonstrates that Amador has expended economic resources to monitor and enable itself to address potential pollution caused by stormwater discharges at the prison. It is also apparent that, if the prison indeed is improperly discharging contaminated stormwater, court-monitored injunctive relief preventing such improper discharges would obviate the need for Amador to expend further resources monitoring the situation itself. Plaintiffs have therefore sufficiently established that Amador has standing, and the court will enter partial summary judgment for plaintiffs accordingly.

2. California Sportfishing Protection Association

1 CSPA, as an organization rather than an individual,
2 asserts organizational standing. (Mot. at 24.) "An association
3 has standing to bring suit on behalf of its members when [1] its
4 members would otherwise have standing to sue in their own right,
5 [2] the interests at stake are germane to the organization's
6 purpose, and [3] neither the claim asserted nor the relief
7 requested requires the participation of individual members in the
8 lawsuit." Friends of the Earth, 528 U.S. at 181 (citing Hunt v.
9 Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)).

10 Defendants do not appear to dispute that the interests
11 at stake -- preventing unlawful pollution of Mule Creek -- are
12 germane to CSPA's purpose. As one of CSPA's directors states in
13 a declaration, CSPA has "approximately 2,000 members" who use
14 rivers and streams in the region "for recreational, scientific,
15 educational and conservation purposes." (Decl. of Richard
16 McHenry ¶¶ 1, 3 (Docket No. 45-3).) CSPA's purposes include
17 "promoting the conservation, restoration and enhancement" of
18 state waterways to improve "the quality of sportfishing in
19 California." (Id. ¶ 4.) CSPA also engages "with state and
20 federal agencies" by giving public comment on proposed regulatory
21 action, submitting formal complaints regarding water use actions
22 and regulations, and participating in administrative proceedings
23 regarding the issuance of NPDES permits. (See id. ¶¶ 5-12.) The
24 interests at stake clearly are germane to CSPA's purpose.

25 Nor do defendants contend the claim asserted or relief
26 requested require participation of individual CSPA members, and
27 no reason why this would be the case is apparent to the court.
28 Accordingly, the only remaining issue is whether CSPA's members

1 would have standing to sue in their own right. See id.

2 In support of plaintiffs' argument that CSPA's members
3 would have standing to sue on their own, plaintiffs have provided
4 declarations from three CSPA members, Richard McHenry, Edmund
5 Taylor, and Katherine Evatt. Each of the three CSPA members
6 states in their declaration that they use or have used waterways
7 near or downstream from Mule Creek, that they are concerned those
8 waterways have become hazardous due to contaminated discharges
9 from the prison, and that their use or enjoyment of the waterways
10 has been reduced because of those concerns. (See Decl. of
11 McHenry ¶¶ 14, 16-17; Decl. of Edmund Taylor ¶¶ 10, 13-20 (Docket
12 No. 45-7); Decl. of Katherine Evatt ¶¶ 15-16, 19-20 (Docket No.
13 45-8).)

14 Plaintiffs are also required to show that they had
15 standing at the time this action was filed. Friends of the
16 Earth, 428 U.S. at 189 (citing Arizonans for Off. Eng. v.
17 Arizona, 520 U.S. 43, 68 n.22 (1997)). Although in their
18 declarations the CSPA members state that they became aware of
19 pollution in Mule Creek allegedly caused by the prison, in some
20 cases by reading reports or articles, McHenry and Evatt do not
21 state when they became aware of the alleged pollution, as would
22 be necessary to show they were aware of it at the outset of this
23 litigation. (See Decl. of McHenry ¶ 16; Decl. of Evatt ¶ 16.)
24 Accordingly, their declarations do not establish that McHenry and
25 Evatt were aware of any injury at the time this action was filed.

26 Taylor, however, has filed a supplemental declaration
27 clarifying that he first became aware of the discharges to Mule
28 Creek "as early as February of 2018," before the initiation of

1 this action, and became concerned about downstream water quality
2 at that time. (Supp. Decl. of Edmund Taylor ¶¶ 2-3 (Docket No.
3 55-3).) Taken together, Taylor's two declarations are sufficient
4 to show that he would have standing to sue in his own right.
5 Because Taylor is a CSPA member and the other requirements for
6 organizational standing are satisfied, plaintiffs have adequately
7 shown that CSPA has standing to sue as an organization. See
8 Friends of the Earth, 528 U.S. at 181, 189; Nat. Res. Def.
9 Council, 236 F.3d at 994. The court therefore will enter partial
10 summary judgment establishing that CSPA has standing.

11 C. Violation of Small MS4 Permit

12 1. Provision B.1

13 Plaintiffs next argue they are entitled to partial
14 summary judgment establishing that defendants violated multiple
15 provisions of section B of the Small MS4 Permit, including
16 provision B.1. (Mot. at 27-30.) Section B is titled "Discharge
17 Prohibitions," and provision 1 provides: "Discharges of waste
18 from the MS4 that are prohibited by Statewide Water Quality
19 Control Plans or applicable Regional Water Quality Control Plans
20 (Basin Plans) are prohibited." (Small MS4 Permit § B.1.)

21 In support of their argument, plaintiffs point to a
22 declaration from their expert, Karen Ashby, evaluating stormwater
23 data collected at various points near the prison and concluding
24 that discharges have previously violated and continue to violate
25 applicable water quality standards. (See Decl. of Karen Ashby
26 (Docket No. 45-4).) As plaintiffs acknowledge, these conclusions
27 are based on water quality standards applicable to surface waters
28 with the designation "MUN," denoting municipal use, and standards

1 for MUN-designated waters are more stringent than for those
2 without the MUN designation. (See id. ¶ 8(C); Mot. at 17-18;
3 Pls.' Reply ("Reply") at 18 (Docket No. 55).)

4 Defendants argue that the MUN designation does not in
5 fact apply to Mule Creek and that Ashby's conclusions that the
6 prison violated applicable water quality standards are therefore
7 invalid. (Opp. at 31-32.) In support, defendants point to an
8 order by the regional water board listing the beneficial uses
9 applicable to Mule Creek. That order states: "The Central Valley
10 Water Board's Water Quality Control Plan for the Sacramento River
11 and San Joaquin River Basins designates the following beneficial
12 uses for . . . Mule Creek: AGR, REC-1, REC-2, WARM, COLD, MIGR,
13 SPWN, and WILD." (Central Valley Reg. Water Quality Ctrl. Bd.,
14 Water Code 13383 Order to Monitor Discharges to Surface Water
15 (Aug. 6, 2020) ("Aug. 13383 Order") (Docket No. 49-13 at 2).)
16 Because this list does not include the MUN designation,
17 defendants argue, it demonstrates that the regional water board
18 elected not to assign Mule Creek the MUN designation and that the
19 designation is therefore inapplicable to Mule Creek. (Opp. at
20 31-32.)

21 Plaintiffs, on the other hand, point to the regional
22 water board's Water Quality Control Plan, which states that
23 "[t]he beneficial uses of any specifically identified water body
24 generally apply to its tributary streams," as well as a table
25 contained in the Plan listing the designated beneficial uses for
26 various surface waters in the basin. (See Cent. Valley Reg'l.
27 Water Quality Ctrl. Bd., Water Quality Ctrl. Plan (May 2018)
28 ("Basin Plan") (Docket No. 45-10 at 135, 45-11 at 2).) They

1 contend that the table designates the Mokelumne River as MUN and
2 that the MUN designation therefore extends to Mule Creek, based
3 on the Basin Plan's language regarding tributary designations.
4 (See Mot. at 15-16; Reply at 18.) The table indicates that the
5 Mokelumne River is designated MUN for the length running from
6 "Sources" until the Camanche Reservoir, but not for the length
7 running from "Camanche Reservoir to Delta." (See Basin Plan
8 (Docket No. 45-11 at 2, 6).) However, the table does not
9 indicate at which point Dry Creek connects to the Mokelumne
10 River, (see id.), and plaintiffs have not identified other
11 evidence indicating where Dry Creek joins the river.

12 Even assuming the Basin Plan clearly indicates that the
13 portion of the Mokelumne River at which Dry Creek joins is
14 designated MUN, however, it appears to be contradicted by the
15 Board's August 2020 13383 Order, which clearly omits MUN from its
16 list of Mule Creek's beneficial uses.² The 13383 Order is also
17 more specific than the Basin Plan in that it specifically
18 identifies Mule Creek and its beneficial use designations, and it
19 was also issued more recently.³ Although section 13241 of the
20 California Water Code provides for designation of beneficial uses
21 within a Basin Plan, as plaintiffs observe, plaintiffs also argue
22 that a more specific order under section 13383 cannot amend or
23 preempt the Basin Plan's designation of beneficial uses, an
24 argument that is not clearly supported by the provisions of the

25
26 ² A December 2020 13383 order likewise omits the MUN
designation. (See Dec. 13383 Order.)

27 ³ Whereas the 13383 Order was issued in August of 2020,
28 the Basin Plan provided by plaintiffs was most recently revised
in May of 2018. (See Basin Plan; Aug. 13383 Order.)

1 Water Code upon which they rely. See Cal. Water Code §§ 13140,
2 13240, 13241, 13383.

3 Given the Basin Plan's lack of clarity as to whether
4 the relevant portion of the Mokelumne River is designated as MUN
5 and the 13383 Order's omission of the MUN designation in listing
6 Mule Creek's beneficial uses, there is a genuine dispute of fact
7 as to whether Mule Creek in fact is designated MUN. Because the
8 conclusions by plaintiffs' expert assume water quality standards
9 applicable under the MUN designation apply, this disputed fact is
10 material because it appears dispositive of whether her
11 conclusions are applicable to plaintiffs' claims. Because the
12 court cannot currently rely on those conclusions in determining
13 that the prison's discharges violate section B.1 of the Small MS4
14 Permit, the court will deny summary judgment on this issue.

15 2. Provision B.2

16 Plaintiffs also seek summary judgment establishing that
17 defendants violated provision B.2. (Mot. at 30-31.) Provision
18 B.2 provides: "Discharges of storm water from the MS4 to waters
19 of the U.S. in a manner causing or threatening to cause a
20 condition of pollution or nuisance as defined in Water Code
21 § 13050 are prohibited." (Small MS4 Permit § B.2.)

22 Like in their argument regarding provision B.1,
23 plaintiffs appear to argue that because the measured discharges
24 from the prison exceed applicable standards, the discharges
25 necessarily violate provision B.2. (See Mot. at 31.) Because
26 these determinations appear to rely on the conclusion that the
27 MUN beneficial use designation applies to Mule Creek, however --
28 a point which, as noted above, is in dispute -- it is unclear how

1 probative these determinations are until plaintiffs can prove
2 that the MUN designation applies.

3 Further, unlike provision B.1, which simply prohibits
4 discharges that exceed applicable water quality standards,
5 provision B.2's plain language indicates that a violation thereof
6 requires that the discharges actually enter a water of the United
7 States. (See Small MS4 Permit § B.2.) Defendants argue
8 plaintiffs have not proved that the discharges upon which
9 plaintiffs rely actually reached Mule Creek and thus have not
10 proved a violation of provision B.2. (Opp. at 31.)

11 The parties' arguments and evidence concern four
12 discharge sampling locations at various points along the MS4:
13 MCSP2, MCSP3, MCSP5, and MCSP6. (See, e.g., id.; Mot. at 14;
14 Aug. 13383 Order; Dec. 13383 Order.) A map of the prison, of
15 Mule Creek, and of the various sampling locations shows that
16 MCSP2 and MCSP3 are near Mule Creek and that MCSP5 and MCSP6 are
17 somewhat further away and nearer to the prison. (See Aug. 13383
18 Order, Fig. 1 (Docket No. 49-13 at 11).) Defendants have also
19 provided evidence that unlike MCSP2 and MCSP3, "stormwater runoff
20 from [MCSP5 and MCSP6] travels approximately 630 and 1500 feet
21 respectively through vegetated bioswales prior to discharge to
22 Mule Creek." (Decl. of Timothy Simpson ¶ 22(c)(ii) (Docket No.
23 48-3) (citing Decl. of Anthony Orta ¶¶ 13-14 (Docket No. 48-2)).)
24 As defendants' expert, Timothy Simpson, opines in his
25 declaration, "bioswales . . . provide filtration and infiltration
26 treatment, and runoff can also be captured into soil," such that
27 concentrations of contaminants that exist in stormwater
28 discharged from MCSP5 and MCSP6 may be reduced by the time it

1 reaches Mule Creek. (See id.)

2 Defendants argue that because plaintiffs'
3 determinations that discharged stormwater contained impermissible
4 levels of contaminants relied on samples taken from MCSP5 and
5 MCSP6, plaintiffs have not established that those levels were
6 present when the stormwater ultimately reached Mule Creek. (Opp.
7 at 31; see Simpson Decl. at ¶¶ 19, 22(c)(ii) (opining that
8 "analytical results from MCSP5 and MCSP6 are not representative
9 of water quality at the point of discharge to Mule Creek, and
10 that plaintiffs therefore have not "demonstrat[ed] that the
11 discharges [they] consider[] to be ongoing violations are
12 actually reaching [Mule Creek] at concentrations that [they]
13 allege[] are permit violations").) Plaintiffs do not dispute
14 that the samples upon which they rely came from MCSP5 and MCSP6
15 or that those locations are situated 630 and 1500 feet from Mule
16 Creek, but rather argue these details are irrelevant to a
17 determination that defendants violated provision B.2, based on
18 the language of a section 13383 order issued by the regional
19 water board. (See Mot. at 30-31; Reply at 19-20.)

20 That order directs the prison to monitor discharges at
21 five locations, including MCSP5 and MCSP6. (Dec. 13383 Order
22 § III.) It also provides:

23 Samples and measurements taken as required herein
24 shall be representative of the volume and nature of
25 the monitored discharge. All samples shall be taken
26 at the monitoring locations specified [herein] and,
unless otherwise specified, before the monitored flow
joins or is diluted by any other waste stream, body of
water, or substance.

27 (Id. § II.A.) Plaintiffs argue that the statement that samples
28 taken pursuant to the section 13383 order "shall be

1 representative of the volume and nature of the monitored
2 discharge" means those samples are per se representative of the
3 concentrations of contaminants that actually reached Mule Creek
4 for purposes of establishing a violation of the Small MS4 Permit.
5 (Reply at 19-20.)

6 In support, plaintiffs rely on Natural Resources
7 Defense Council, Inc. v. County of Los Angeles, 725 F.3d 1194
8 (9th Cir. 2013). There, in contesting alleged violations of an
9 MS4 permit, "which prohibit[ed] 'discharges from the [] MS4 that
10 cause or contribute to the violation of Water Quality Standards
11 or water quality objectives,'" the defendant county argued that
12 violations could not be established on the basis of discharge
13 sampling because the discharges originated from points throughout
14 the county's sewer system and thus could not be solely attributed
15 to the county itself. See id. at 1205-06.

16 In that case, however, there was no dispute that the
17 sampled discharges actually reached the relevant bodies of water
18 or that the levels of contaminants measured at the designated
19 monitoring points were representative of the levels that entered
20 those waters. See id. at 1204 ("County Defendants do not dispute
21 that they are discharging pollutants from the [] MS4 into these
22 rivers.") Thus, although plaintiffs point to that decision's
23 statement that "[i]f the District's monitoring data shows that
24 the level of pollutants in federally protected water bodies
25 exceeds those allowed under the Permit, then . . . the monitoring
26 data conclusively demonstrate that the County Defendants are not
27 'in compliance' with the Permit conditions," id. at 1206-07, this
28 conclusion does not clearly apply in this case because defendants

1 dispute that the concentrations of contaminants detected at MCSP5
2 and MCSP6 in fact reached "federally protected water bodies."
3 And although the December 2020 13383 order provides that
4 "measurements taken as required herein shall be representative of
5 the volume and nature of the monitored discharge," it does not
6 state that such discharges are considered "[d]ischarges . . . to
7 waters of the U.S." -- the language in provision B.2 -- or
8 otherwise clearly indicate that such discharges are to be
9 considered representative of those that ultimately enter Mule
10 Creek.⁴

11 Similarly, to establish a violation of provision B.2,
12 the discharges into Mule Creek must "caus[e] or threaten[] to
13 cause a condition of pollution or nuisance" therein. (Small MS4
14 Permit § B.2.) In support of their argument that the alleged
15 contamination here "threaten[s] to cause a condition of pollution
16 or nuisance," plaintiffs rely on San Diego Gas & Electric Company
17 v. San Diego Regional Water Quality Control Board, 36 Cal. App.
18 5th 427 (4th Dist. 2019). Although the court there relied on a
19 report stating the defendant's discharge of pollutants into a bay
20 led the pollutants to "accumulate[] . . . in the marine
21 sediment," thereby making various harms to "aquatic life,

22
23 ⁴ Plaintiffs may argue that this conclusion is implied,
24 i.e., that the term "discharges" as used in the December 13383
25 order means "discharges that enter Mule Creek." That the Small
26 MS4 Permit itself appears to differentiate between violations
27 that may be established based simply on "[d]ischarges . . . from
28 the MS4" and those that must be established based on
"[d]ischarges . . . from the MS4 to waters of the U.S.," however,
suggests that the December 13383 order would need more specific
language in order to imply the latter rather than the former.
(Small MS4 Permit §§ B.1, B.2 (emphasis added).)

1 aquatic-dependent wildlife, and human health" likely to occur,
2 see id. at 432, 439-40, here plaintiffs do not appear to have
3 demonstrated that contaminants at issue here in fact reached or
4 "accumulated . . . in" Mule Creek.

5 Therefore, because there appears to be a dispute of
6 material fact as to whether the discharges upon which plaintiffs
7 rely reached Mule Creek, the court cannot at this time conclude
8 that defendants' discharges entered "waters of the U.S." or
9 "caus[ed] or threaten[ed] to cause a condition of pollution or
10 nuisance" therein. (See Small MS4 Permit § B.2.) Accordingly,
11 summary judgment on the issue of whether defendants violated
12 provision B.2 of the Small MS4 Permit will be denied.

13 3. Provision B.3

14 Provision B.3 of the Small MS4 Permit provides in part:
15 "Discharges through the MS4 of material other than storm water to
16 waters of the U.S. shall be effectively prohibited, except as
17 allowed under this Provision or as otherwise authorized by a
18 separate NPDES permit." (Id. § B.3.) Because to establish a
19 violation of this provision, like with provision B.2, plaintiffs
20 must establish that the contaminants at issue were
21 "[d]ischarge[d] . . . to waters of the U.S.," the same issues
22 identified above, regarding the alleged violations of provision
23 B.2, apply here as well.

24 In arguing that defendants violated provision B.3,
25 plaintiffs also contend that there are "defects in both the MS4
26 and [the prison's] sanitary sewer system that allow for indirect
27 connections between the two systems," thereby allowing wastewater
28 to enter and be discharged from the MS4. (Mot. at 32.) In

1 support of this contention, plaintiffs point to a regional water
2 board review of a 2019 CDCR report, in which board staff
3 concluded, based on that report, that there were "numerous
4 locations in [the MS4 and wastewater] systems where infiltration
5 and exfiltration are likely occurring," (Kenny Croyle, Rev. of
6 Revised Storm Water Sys. Investigation Findings Report, Cal.
7 Dept. of Corrs. & Rehab., Mule Creek State Prison, Amador Cnty.
8 § 2.3 (Dec. 7, 2020) (Docket No. 45-20 at 63)), as well as a 2020
9 EPA inspection report identifying "[p]otential commingling of
10 waters between the stormwater and wastewater systems" as an
11 "area[] of concern," (Grant Scavello, Env't Prot. Agency, Mule
12 Creek State Prison Inspection Rep. § IV.1 (Nov. 19, 2020) (Docket
13 No. 45-21 at 5) (boldface omitted)).

14 Defendants respond by noting that in response to an
15 order from the regional water board regarding these concerns, the
16 CDCR commissioned an independent investigation into the issue of
17 potential cross-connection between the two systems. (See Revised
18 Investigation Rep., Executive Summary (Docket No. 49-6 at 97).)
19 A report prepared based on the investigation concluded that dye
20 testing, which was performed to trace whether dye added to the
21 prison's wastewater system migrated into the MS4, revealed no
22 evidence of cross-connections, and it ultimately concluded that
23 there were "no cross-connections between the stormwater and
24 sanitary sewer collection systems, nor . . . any information
25 indicating that the stormwater collection system has been or is
26 being contaminated with sewage, wastewater, or grey water." (Id.
27 §§ 3.4.2.1, 5.) Although it appears that the reports cited by
28 plaintiffs postdate the period during which defendants'

1 independent investigation was conducted, the contradiction
2 between the reports nevertheless creates a genuine dispute of
3 material fact as to whether defendants are violating provision
4 B.3 based on alleged cross-contamination from the sanitary sewer
5 system.

6 Because there are multiple genuinely disputed issues of
7 fact that are germane to whether defendants have violated
8 provision B.3 of the Small MS4 Permit, summary judgment on this
9 issue will be denied.

10 4. Section D

11 Section D of the Small MS4 Permit provides in part:
12 "Discharges shall not cause or contribute to an exceedance of
13 water quality standards contained in a Statewide Water Quality
14 Control Plan, the California Toxics Rule (CTR), or in the
15 applicable Regional Water Board Basin Plan." (Small MS4 Permit
16 § D.) In arguing defendants violated section D, plaintiffs rely
17 on the same conclusions by their expert that defendants'
18 discharges contained levels of contaminants that exceeded water
19 quality standards as they do in arguing defendants violated
20 provision B.1. (See Mot. at 34-36.) As noted above, those
21 conclusions rely on the assumption that Mule Creek has a MUN
22 beneficial use designation, but the court has concluded that
23 whether the MUN designation applies to Mule Creek is a disputed
24 issue of material fact. Accordingly, for the same reason as with
25 provision B.1, at this time the court cannot conclude that
26 defendants are in violation of section D of the Small MS4 permit.
27 Summary judgment on the issue of whether defendants violated
28 section D of the Small MS4 Permit will therefore be denied.

1 D. Violation of Industrial General Permit

2 Finally, plaintiffs argue defendants violated the
3 Industrial General Permit. The Industrial General Permit
4 includes a host of monitoring and reporting requirements for
5 facilities engaged in industrial activities that are exposed to
6 precipitation but, as noted above, provides an exception for
7 facilities that certify their industrial activities are not
8 exposed to precipitation. (See Indus. Gen. Permit § XVII.)

9 Plaintiffs rely on a survey of the prison's premises
10 performed by their expert, Karen Ashby, identifying locations in
11 which materials plaintiffs contend are used for industrial
12 purposes were visible and uncovered during Ashby's visit. (See
13 Mot. at 36-37; Ashby Decl. ¶¶ 26-27.) These consist of small
14 amounts of trash or debris near the loading dock for the sewing
15 facility; wooden pallets stored outside of industrial buildings;
16 a secondary storage container with liquid on the ground in front
17 of it, indicating a potential leak; and cardboard containers
18 located at the edge of a covered loading dock near the meat
19 packing area. (See id.)

20 Defendants do not appear to dispute that these
21 materials were present during Ashby's inspection. (See Opp. at
22 42-44.) Instead, they contend the prison is in compliance with
23 the exclusion's requirements, pointing to a report by the
24 regional water board following a January 27, 2021 inspection of
25 the industrial facilities, in which the board determined that the
26 prison was indeed in compliance. (See Cent. Valley Reg. Water
27 Quality Ctrl. Bd., Inspection Report (Feb. 11, 2021) (Docket No.
28 49-12 at 55).)

1 Although plaintiffs note that the Industrial General
2 Permit provides that "[i]f circumstances change and Industrial
3 Materials and Activities become exposed to rain, snow, snowmelt,
4 and/or runoff, the conditions for [the no-exposure] exclusion
5 shall no longer apply," (Indus. Gen. Permit § XVII.E.2), the
6 phrasing of this provision suggests that there must be actual --
7 rather than potential -- exposure to precipitation for an
8 otherwise-certified no-exposure exclusion to become invalidated
9 in between certification periods. This reading finds support in
10 the language of the Industrial General Permit's initial
11 explanation of the NEC exclusion, in which it states: "Discharges
12 composed entirely of storm water that has not been exposed to
13 industrial activity are not industrial storm water discharges."
14 (Id. § XVII.A.)

15 However, plaintiffs have not shown that the materials
16 identified during Ashby's inspection were in fact exposed to
17 precipitation, or that the materials were uncovered for a period
18 long enough to support an inference that they were in fact
19 exposed. Accordingly, there is at least a dispute of material
20 fact as to whether conditions that would invalidate the prison's
21 NEC coverage outside the context of an annual NEC inspection were
22 present at the time this action was filed. Because the alleged
23 violation of the Industrial General Permit depends on a
24 determination that the NEC exclusion did not apply, the court
25 will deny summary judgment on the issue of whether defendants
26 violated the Industrial General Permit.

27 IT IS THEREFORE ORDERED that plaintiffs' motion for
28 partial summary judgment (Docket No. 45) be, and the same hereby

1 is, GRANTED IN PART and DENIED IN PART as follows:

- 2 • Summary judgment is GRANTED for plaintiffs,
3 establishing that (1) Mule Creek is a water of the
4 United States and (2) plaintiffs County of Amador and
5 California Sportfishing Protection Alliance have
6 standing to bring this action, see Fed. R. Civ. P.
7 56(a), (g);
8 • Summary judgment is DENIED in all other respects.

9 Dated: August 29, 2022



10 WILLIAM B. SHUBB
11 UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28